

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID BRIAN JOHNSON,

Defendant-Appellant.

UNPUBLISHED

May 23, 2006

No. 261096

Alger Circuit Court

LC No. 04-001639-FH

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of arson of a dwelling house, MCL 750.72, and arson of insured property, MCL 750.75. The trial court sentenced defendant as a fourth offense habitual offender, MCL 769.12, to two concurrent terms of 6 to 20 years in prison. We affirm.

I. Evidentiary Issues

Defendant contends that the trial court abused its discretion in admitting evidence of defendant's extradition from Minnesota and defendant's involvement in a prior house fire. We disagree.

A. Standard of Review

We review the admission of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A party opposing the admission of evidence must object at trial and state the grounds for the objection. MRE 103(a)(1); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Defendant did not object to the admission of any evidence relating to his extradition or his involvement in the prior fire. Because these evidentiary issues are unpreserved, defendant must demonstrate plain error that affected his substantial rights, meaning that the error either resulted in the conviction of an innocent person or seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.* Furthermore, error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

B. Extradition

Defense counsel not only failed to object to the brief mention of defendant being in Minnesota elicited by the prosecution, but he first mentioned defendant's move to Minnesota in his opening statement. He also pursued questioning on this topic during cross-examination. In regard to Donald Harris, the first witness to take the stand, the prosecutor asked about defendant's failure to cooperate with the insurance company's investigation. Harris stated that attempts were made to schedule defendant's examination, but defendant was in Minnesota. On cross-examination, defense counsel asked whether Harris knew that defendant and his family moved to Minnesota. Harris stated that he did. Defense counsel then asked, "Okay, so the Johnsons were not trying to *abscond* or go hide somewhere, where they, in your opinion?" Harris replied, "Well, in my opinion, I thought they were." Defense counsel also elicited testimony from Dan Brown about the meaning of extradition "in laymen's terms." Because defendant contributed to the admission of testimony regarding extradition and the possibility of flight, whether by plan or negligence, it cannot form the basis for reversal on appeal. *Gonzalez, supra* at 224.

C. Other Acts Evidence

Defendant also contends that the trial court erred in admitting evidence regarding defendant's involvement in a prior house fire. However, this evidence was introduced by defense counsel, not the prosecution. The prosecution questioned Harris and Bruce Tozer briefly and generally about whether they knew of defendant's claim history. The prosecution did not pose any questions about the cause of the prior fire or, through her questions, implicate defendant's involvement in causing that fire. Rather, it was defense counsel who specifically probed defendant's involvement in the prior fire.

On direct examination of Thomas Balmes, the prosecutor questioned him about whether he went to see the fire in this case. Balmes stated that his wife, who went to see the fire first, came back and told him that defendant had burned down his house. Although this testimony indicated that Balmes' wife had knowledge of the cause of the fire, testimony about the prior fire was elicited only on cross-examination. When defense counsel pressed Balmes about how anyone would know that defendant caused the fire in this case, Balmes responded, "because his first house burned down there and he collected the insurance." Defense counsel further questioned Balmes about the prior fire and Balmes testified that defendant "told me himself that he burned his house down once." Defense counsel asked, "Dave told you that . . . He told you that he burned his first house down?" Balmes then asked whether defense counsel wanted him to state exactly what defendant had told him. Defense counsel stated, "That's what I'm asking you." Balmes then testified about a conversation he had with defendant about the prior fire and about what other people had stated about defendant's involvement in that fire. Defense counsel then indicating through questioning that much of Balmes' testimony was based on hearsay, that the police never investigated the prior fire, and that the people who talked about defendant starting the prior fire simply did not like defendant. Thus, it appears that questioning along these lines was part of defense counsel's trial strategy. Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, *Gonzalez, supra* at 224, the admission of this evidence does not provide a basis for reversal.

II. Prosecutorial Misconduct

Defendant next argues that he was denied a fair trial by repeated instances of prosecutorial misconduct during closing argument. We disagree.

“Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). There was no timely objection to any of the claims raised here. “Generally, a prosecutorial misconduct claim is a constitutional issue reviewed de novo.” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, defendant’s unpreserved claims of error may only be reviewed for plain error. *Callon*, *supra* at 329. Reversal is not required “where a curative instruction could have alleviated any prejudicial effect.” *Id.* at 329-330.

Defendant asserts that the prosecutor engaged in improper vouching. A prosecutor may not vouch for the credibility of a witness on the basis of special knowledge, otherwise unavailable to the jury, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), but may argue that, on the basis of the evidence, a witness is worthy or unworthy of belief, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor in this case did nothing more than emphasize the evidence that supported the veracity of her witnesses and the evidence that tended to discredit defendant’s expert witness. These statements were not improper.

Defendant also challenges the prosecutor’s reference to the Scott Peterson murder case when she thanked the jury for their service over five days of trial and then stated that they “could have been selected for the Scott Peterson jury and spent five months.” There is nothing in this singular comment that suggests the prosecutor was trying to inject outside issues into this case. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999).

Defendant also challenges the prosecutor’s characterization of defendant’s repeated claims as to the importance of a negative lab test as nothing more than a “catchy slogan” that was “kind of like saying if the glove doesn’t fit, you must acquit. But it’s again a little insulting to your intelligence.” This statement was not inflammatory. It was no more than an attempt to explain to the jury, using a well-known anecdote from a famous case, that it should not be persuaded by an attention-grabbing phrase.

Defendant also challenges the prosecutor’s statement that “[w]e’ll give the defendant a few points for not killing his dog.” This was not improper. The prosecutor was simply arguing from the evidence that defendant’s dog was outside, when it was usually inside, indicating that the defendant knew there was going to be a fire. A prosecutor need not make an argument in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Next, defendant challenges the prosecutor’s characterization of defendant’s story about being blown over 30 feet through his garage door and into his driveway, as a pre-emptive strike that is “the Alger County equivalent of going on T.V. and saying, ‘Where’s Lacy?’ ” The prosecutor did nothing more than use a well-known incident from a famous case as shorthand for saying that defendant made public statements designed to make himself look like the victim

rather than the perpetrator. Further, there was no similarity in the crimes charged here and the crimes in the Peterson case. The crimes are so dissimilar that there was little if any danger of any bad sentiment about the Peterson case influencing the juror's in this case.

Finally, defendant challenges the prosecutor's use of a 9-11 analogy:

My 9-11 analogy earlier, . . . it's imperfect because one of the unknowns there is . . . identity. We'll never know who was sitting in the pilots' seats when the planes were crashed. The point is that we are still able to reach the conclusion that the crashes were deliberate simply by the number of crashes, the timing of the crashes, and most particularly the site of the crashes.

Here, the prosecutor was using a well-known example to explain to the jury how circumstantial evidence can indicate guilt where there is no way to know, based on direct observation, what happened in a given situation. While the reference might have been in poor taste, it did not rise to the level of prosecutorial misconduct.

Defendant also contends that in failing to object to the above-cited comments, defense counsel failed to adequately represent defendant. Because there was no prosecutorial misconduct, there can be no error in defense counsel's failure to object to it. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

III. Sufficiency of the Evidence

Defendant also contends that the prosecutor failed to produce sufficient evidence of defendant's guilt beyond a reasonable doubt. We again disagree. "In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime." *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004) (footnotes omitted).

Defendant asserts solely that there was insufficient evidence to support a finding beyond a reasonable doubt that he set the fire. Defendant's primary argument in support of this assertion is that, because no one saw him do it and he had no reason to do it, he could not have been found guilty beyond a reasonable doubt. However, the evidence demonstrated that defendant was at the scene when the fire was started. It also demonstrated defendant's financial situation and what could be found to be attempts to set up a propane gas leak as the cause of the fire. Further, expert testimony established that the fire was set from ignitable liquids in the garage, and not from a propane explosion. Given this circumstantial evidence and the reasonable inferences that could be drawn therefrom, the jury could have concluded beyond a reasonable doubt that defendant started the fire.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis